Supreme Court, U. S.
FILED
NOV 9 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-690

KATHLEEN R. REITER,

Petitioner,

vs.

SONOTONE CORP., et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE STATES OF ALABAMA, ALASKA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSOURI, MONTANA, NEBRASKA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, RHODE ISLAND AND PROVIDENCE PLANTATIONS, SOUTH DAKOTA, TENNESSEE, UTAH, VERMONT, WASHINGTON, WISCONSIN, WYOMING AND THE COMMONWEALTHS OF PENNSYLVANIA AND VIRGINIA, *AMICI CURIAE,* IN SUPPORT OF THE PETITION

WARREN SPANNAUS
Attorney General
RICHARD B. ALLYN
Solicitor General
ALAN H. MACLIN
Chief, Antitrust Division
STEPHEN P. KILGRIFF
Special Assistant
Attorney General
THOMAS W. KENYON
Special Assistant
Attorney General
720 American Center Building
St. Paul, Minnesota 55101
Attorneys for State of Minnesota

JOHN ASHCROFT
Attorney General
ROGER BERN
Chief Counsel, Antitrust Division
WALTER O. THEISS
Assistant Attorney General
GREG HOFFMANN
Assistant Attorney General
Supreme Court Building
Jefferson City, Missouri 65101
Attorneys for State of Missouri

(Additional List of Counsel on Inside Cover)

224-7631 — Review Publishing Co., 287 E. 6th St., St. Paul, Minn. 55101 — 224-7631

WILLIAM J. BAXLEY
Attorney General
THOMAS T. ZIEMAN, JR.
Chief, Antitrust Section
250 Administrative Building
Montgomery, Alabama 36130
Attorneys for State of Alabama

AVRUM M. GROSS
Attorney General
MARK E. ASHBURN
Assistant Attorney General
420 L Street
Suite 100
Anchorage, Alaska 99501
Attorneys for State of Alaska

JOHN A. LaSOTA, JR.
Attorney General
KENNETH R. REED
Chief Counsel
Antitrust Division
126 State Capitol Building
Phoenix, Arizona 85007
Attorneys for State of Arizona

BILL CLINTON
Attorney General
ROYCE O. GRIFFIN
Deputy Attorney General
Chief, Antitrust Division
122 National Old Line Building
Little Rock, Arkansas 72201
Attorneys for State of Arkansas

EVELLE J. YOUNGER
Attorney General
WARREN J. ABBOTT
Assistant Attorney General
LINDA L. TEDESCHI
Deputy Attorney General
Department of Justice
3580 Wilshire Boulevard
Los Angeles, California 90010
Attorneys for State of California

J. D. MacFARLANE
Attorney General
B. LAWRENCE THEIS
First Assistant Attorney General
Antitrust Section
1525 Sherman Street
Denver, Colorado 80203
Attorneys for State of Colorado

CARL R. AJELLO
Attorney General
GERARD J. DOWLING
Assistant Attorney General
LARRY H. EVANS
Assistant Attorney General
30 Trinity Street
Post Office Box 120
Hartford, Connecticut 06115
Attorneys for State of Connecticut

RICHARD R. WIER, JR.
Attorney General
WILLIAM E. KIRK, III
Assistant Attorney General
State Office Building
Wilmington, Delaware 19801
Attorneys for State of Delaware

ROBERT L. SHEVIN
Attorney General
CHARLES R. RANSON
Special Assistant Attorney General
Department of Legal Affairs
The Capitol
Tallahassee, Florida 32304
Attorneys for State of Florida

RONALD Y. AMEMIYA
Attorney General
THOMAS T. WOOD
Deputy Attorney General
225 Queen Street
Suite 402
Honolulu, Hawaii 96813
Attorneys for State of Hawaii

WAYNE L. KIDWELL
Attorney General
RUDOLF D. BARCHAS
Deputy Attorney General
Chief, Business Regulation Division
State House
Boise, Idaho 83720
Attorneys for State of Idaho

WILLIAM J. SCOTT
Attorney General
JOHN E. NOEL
Chief, Antitrust Division
188 West Randolph Street
Suite 2118
Chicago, Illinois 60601
Attorneys for State of Illinois

THEODORE L. SENDAK
Attorney General
219 State House
Indianapolis, Indiana 46204
Attorney for State of Indiana

RICHARD C. TURNER
Attorney General
GARY H. SWANSON
Assistant Attorney General
Antitrust Division
State Capitol
Des Moines, Iowa 50319
Attorneys for State of Iowa

CURT T. SCHNEIDER
Attorney General
THOMAS W. REGAN
Deputy Attorney General
Chief, Antitrust Division
State Capitol Building
Topeka, Kansas 66612
Attorneys for State of Kansas

FRANCIS B. BURCH
Attorney General
THOMAS M. WILSON, III
Assistant Attorney General
Chief, Antitrust Division
One South Calvert Street
Baltimore, Maryland 21202
Attorneys for State of Maryland

FRANCIS X. BELLOTTI
Attorney General
PAULA W. GOLD
Assistant Attorney General
Chief, Public Protection Bureau
STEVEN J. GREENFOGEL
Chief, Antitrust Division
One Ashburton Place
Boston, Massachusetts 02108
Attorneys for State of Massachusetts

FRANK J. KELLEY
Attorney General
EDWIN M. BLADEN
Assistant Attorney General
Consumer Protection and Antitrust Division
525 West Ottawa Street
Lansing, Michigan 48913
Attorneys for State of Michigan

MIKE T. GREELY
Attorney General
JEROME J. CATE
Assistant Attorney General
Capitol Station
Helena, Montana 59601
Attorneys for State of Montana

PAUL L. DOUGLAS
Attorney General
ROBERT F. BARTLE
Assistant Attorney General
Antitrust Division
PAUL E. HOFMEISTER
Assistant Attorney General
Antitrust Division
State Capitol
Lincoln, Nebraska 68509
Attorneys for State of Nebraska

THOMAS D. RATH
Attorney General
EDWARD E. LAWSON
Antitrust Counsel
State House Annex
Concord, New Hampshire 03301
Attorneys for State of New Hampshire

JOHN J. DEGNAN
Attorney General
ALFRED J. LUCIANI
Chief, Antitrust Division
13 Roszel Road
Princeton, New Jersey 08540
Attorneys for State of New Jersey

TONEY ANAYA
Attorney General
JAMES J. WECHSLER
Assistant Attorney General
DONALD B. MONNHEIMER
Assistant Attorney General
Post Office Drawer 1508
Santa Fe, New Mexico 87501
Attorneys for State of New Mexico

LOUIS J. LEFKOWITZ
Attorney General
JOHN M. DESIDERIO
Assistant Attorney General
Chief, Anti-Monopolies Bureau
Two World Trade Center
New York, New York 10047
Attorneys for State of New York

RUFUS L. EDMISTEN
Attorney General
HOWARD A. KRAMER
Deputy Attorney General for Legal Affairs
DAVID S. CRUMP
Special Deputy Attorney General
Antitrust Division
Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602
Attorneys for State of North Carolina

ALLEN I. OLSON
Attorney General
DALE V. SANDSTROM
Assistant Attorney General
Chief, Consumer Fraud and Antitrust Division
TERRY L. ADKINS
Assistant Attorney General
State Capitol
Bismarck, North Dakota 58505
Attorneys for State of North Dakota

WILLIAM J. BROWN
Attorney General
EUGENE F. McSHANE
Assistant Attorney General
Chief, Antitrust Section
Suite 1700, LeVeque Tower
50 West Broad Street
Columbus, Ohio 43215
Attorneys for State of Ohio

LARRY DERRYBERRY
Attorney General
JAMES H. GRAY
Chief, Civil Litigation
112 State Capitol
Oklahoma City, Oklahoma 73105
Attorneys for State of Oklahoma

JAMES A. REDDEN
Attorney General
STEPHEN L. DUNNE
Chief Counsel
Antitrust Division
100 State Office Building
Salem, Oregon 97310
Attorneys for State of Oregon

GERALD GORNISH
Acting Attorney General
NORMAN J. WATKINS
Deputy Attorney General
Chief, Civil Litigation
JOHN L. SHEARBURN
Deputy Attorney General
Antitrust Division
Department of Justice
Capitol Annex
Harrisburg, Pennsylvania 17120
Attorneys for the Commonwealth of Pennsylvania

JULIUS C. MICHAELSON
Attorney General
PATRICK J. QUINLAN
Special Assistant Attorney General
Providence County Courthouse
Providence, Rhode Island 02903
Attorneys for State of Rhode Island and Providence Plantations

WILLIAM J. JANKLOW
Attorney General
THOMAS J. WELK
Assistant Attorney General
State Capitol
Pierre, South Dakota 57501
Attorneys for State of South Dakota

WILLIAM M. LEECH, JR.
Attorney General
WILLIAM J. HAYNES, JR.
Deputy Attorney General
450 James Robertson Parkway
Nashville, Tennessee 37219
Attorneys for State of Tennessee

ROBERT B. HANSEN
Attorney General
ANDREW W. BUFFMIRE
Assistant Attorney General
Chief, Antitrust Division
419 Boston Building
Salt Lake City, Utah 84111
Attorneys for State of Utah

M. JEROME DIAMOND
Attorney General
JAY I. ASHMAN
Assistant Attorney General
Pavilion Building
State Street
Montpelier, Vermont 05602
Attorneys for State of Vermont

MARSHALL COLEMAN
Attorney General
JOHN J. MILES
Assistant Attorney General
Antitrust Unit
Supreme Court Building
1101 East Broad Street
Richmond, Virginia 23219
Attorneys for Commonwealth of Virginia

SLADE GORTON
Attorney General
THOMAS L. BOEDER
Senior Assistant Attorney General
EARLE J. HEREFORD, JR.
Assistant Attorney General
Consumer Protection and Antitrust Division
1366 Dexter Horton Building
Seattle, Washington 98104
Attorneys for State of Washington

BRONSON C. La FOLLETTE
Attorney General
MICHAEL L. ZALESKI
Assistant Attorney General
Antitrust Division
114 East State Capitol
Madison, Wisconsin 52702
Attorneys for State of Wisconsin

JOHN J. ROONEY
Attorney General
PETER J. MULVANEY
Deputy Attorney General
Civil Division
JAMES W. GUSEA
Assistant Attorney General
123 Capitol Building
Cheyenne, Wyoming 82002
Attorneys for State of Wyoming

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED 2

INTEREST OF *AMICI CURIAE* 2

REASONS FOR GRANTING THE WRIT 3

I. The Decision of the Eighth Circuit Presents a Vitally Important Question Regarding Nonbusiness-Consumer Standing Under Section 4 of the Clayton Act 3

II. The Decision of the Eighth Circuit is Erroneous Because of the Court's Misinterpretation of Prior Judicial Decisions Construing Section 4, and Its Misinterpretation of the Statutory Language and Legislative History of Section 4 5

A. Judicial Decisions 5

B. Statutory Language 8

C. Legislative History 9

III. The Decision of the Eighth Circuit Misinterprets, and Would Emasculate, the *Parens Patriae* Provisions of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 11

IV. The Question of Nonbusiness-Consumer Standing Under Section 4 has Resulted in a Split of Authority Among the District Courts and Will Likely Lead to a Split of Authority Among the Circuit Courts 13

CONCLUSION 14

TABLE OF AUTHORITIES

PAGE

Cases:

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977) 10

California v. Frito-Lay, Inc., 474 F.2d 774 (9th Cir.), *cert. denied*, 412 U.S. 908 (1973) 7

Chattanooga Foundry and Pipe Works v. City of Atlanta, 203 U.S. 390 (1906) 5, 8

Cleary v. Chalk, 488 F.2d 1315 (D.C. Cir. 1973), *cert. denied*, 416 U.S. 938 (1974) 7

Cusick v. N.V. Netherlandsche Combinatie Voor Chemische Industrie, 317 F. Supp. 1022 (E.D. Pa. 1970) 7

Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) 6

Guiterrez v. E. & J. Gallo Winery Co., 425 F. Supp. 1221 (N.D. Cal. 1977), *appeal docketed*, No. 77-1896 (9th Cir. Apr. 22, 1977) 13

Hawaii v. Standard Oil Co., 405 U.S. 251 (1972) 7, 10

Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977) ... 3, 5, 11

In re Ampicillin Antitrust Litigation, 1977-1 Trade Cases ¶ 61,434 (D.D.C. 1977) 5, 7, 13

In re Antibiotic Antitrust Actions, 333 F. Supp. 278 (S.D.N.Y. 1971) 2

In re Petroleum Products Antitrust Litigation, 1977-2 Trade Cases ¶ 61,639 (C.D. Cal. 1977) 5, 7, 13

Jarecki v. G. D. Searle & Co., 367 U.S. 303 (1961) 8, 9

Lefrak v. Arabian American Oil Co., 405 F. Supp. 597 (E.D.N.Y. 1975) 7

Lohse v. Dairy Commission, 1977-2 Trade Cases ¶ 61,805 (D. Nev. 1977) 4, 7, 13

PAGE

Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co., 381 U.S. 311 (1965) .. 4

Pfizer Inc. v. Government of India, 434 U.S. 308 (1978) 6, 10

Radovich v. National Football League, 352 U.S. 445 (1957) 5

Reiter v. Sonotone Corp., 435 F. Supp. 933 (D. Minn. 1977), *rev'd*, 1978-1 Trade Cases ¶ 62,098 (8th Cir. 1978) 5, 13

Reiter v. Sonotone Corp., 1978-1 Trade Cases, ¶ 62,098 (8th Cir. 1978) 6, 8, 9, 10, 11

Smith v. Toyota Motor Sales, U.S.A., Inc. 1977-1 Trade Cases ¶ 61,251 (N.D. Cal. 1977), *appeal docketed*, No. 77-1849 and related cases (9th Cir. Apr. 15, 1977) 13

Theophil v. Sheller-Globe Corp., 446 F. Supp. 131 (E.D.N.Y. 1978), *appeal docketed*, No. 78-7389 (2d Cir. July 27, 1978) 7, 10, 13

United States v. Menasche, 348 U.S. 528 (1955) 9

Waldron v. British Petroleum Co., 231 F. Supp. 72 (S.D.N.Y. 1964) 8

Ware v. Trailer Mart, Inc., No. C74-394 (N.D. Ohio, decided May 31, 1978), *appeal docketed*, No. 78-3383 (6th Cir. July 20, 1978) 13

Weinberg v. Federated Department Stores, Inc., 426 F. Supp. 880 (N.D. Cal. 1977), *appeal docketed*, No. 77-1547 and related cases (9th Cir. Mar. 3, 1977) 13

West Virginia v. Chas. Pfizer & Co., 440 F.2d 1079 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971) 7

PAGE

Statutes:

Clayton Act § 4, 15 U.S.C. § 15 (1976) 2, 3, 5, 6, 7, 8, 9, 12, 13

Hart-Scott-Rodino Antitrust Improvements Act of 1976, tit. III, 15 U.S.C. § 15c-h (1976) 2, 3, 11, 14

Sherman Act § 7, ch. 647, § 7, 26 Stat. 210 (1890) (superseded by Clayton Act § 4, 15 U.S.C. § 15 (1976)) 9, 12

Secondary Authorities:

H.R. Rep. No. 499, 94th Cong., 2d Sess, *reprinted in* [1976] U.S. Code Cong. & Ad. News 2572 ..... 11, 12

Scher, *Emerging Issues Under the Antitrust Improvements Act of 1976*, 77 Colum. L. Rev. 679 (1977) 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-690

KATHLEEN R. REITER,

Petitioner,

vs.

SONOTONE CORP., et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE STATES OF ALABAMA, ALASKA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSOURI, MONTANA, NEBRASKA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, RHODE ISLAND AND PROVIDENCE PLANTATIONS, SOUTH DAKOTA, TENNESSEE, UTAH, VERMONT, WASHINGTON, WISCONSIN, WYOMING, AND THE COMMONWEALTHS OF PENNSYLVANIA, AND VIRGINIA, *AMICI CURIAE*, IN SUPPORT OF THE PETITION

This brief *amici curiae* is submitted by Forty-One States pursuant to Rule 42(4) of the Rules of this Court.

QUESTION PRESENTED

Does the phrase "injured in his business or property," as used in section 4 of the Clayton Act, 15 U.S.C. § 15 (1976), require that a consumer suffer a business injury to have standing to sue for damages?

INTEREST OF *AMICI CURIAE*

The *amici* States are interested in this proceeding by virtue of the States' duty to protect the general welfare of their citizens and their role in encouraging and fostering the national economic policy of free competition embodied in the federal and state antitrust laws.

The holding of the Eighth Circuit Court of Appeals, denying standing under section 4 of the Clayton Act to consumers suing for nonbusiness injuries, affects the *amici* States in a number of significant ways. The decision directly challenges the *amici* States' ability to bring federal treble-damage class actions on behalf of nonbusiness consumers. In the past, a number of States have maintained such actions. *See, e.g., In re Antibiotic Antitrust Actions*, 333 F. Supp. 278, 280 (S.D. N.Y. 1971).

The decision may also challenge the ability of *amici* States and their political subdivisions to bring federal treble-damage actions on their own behalf because they might not be considered to be injured in their "business or property" in a "commercial" sense.

Moreover, the decision emasculates the *parens patriae* authority given the *amici* States by title III of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 15c-h (1976). The Act, although not creating any new substantive

liability,[1] gave the States standing to bring *parens patriae* actions on behalf of their natural citizens who suffer injuries to their property. According to the Eighth Circuit, however, nonbusiness consumers do not have standing to sue. Thus, because *amici* States only have standing in those cases where a right of action previously existed under section 4, the *parens* authority granted by Congress to the *amici* States is jeopardized.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE EIGHTH CIRCUIT PRESENTS A VITALLY IMPORTANT QUESTION REGARDING NONBUSINESS-CONSUMER STANDING UNDER SECTION 4 OF THE CLAYTON ACT.

This case raises a narrow but very important issue: Does a consumer who suffers a nonbusiness injury to his property as the result of an antitrust violation suffer an injury to his "business or property" and thus have standing to maintain an action under section 4 of the Clayton Act?

The Eighth Circuit Court of Appeals, using a strained and restrictive construction of section 4, held that the phrase "injured in his business *or property*" requires a business injury (emphasis added). In essence, the court eliminated the words "or property" from the statute.

If the decision of the Eighth Circuit Court of Appeals is allowed to stand, nonbusiness consumers will no longer have standing to sue for antitrust violations under section 4 of the Clayton Act. The impact of this decision is far-reaching. The

[1] This Court has indicated that title III of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 did not create any new substantive liability under the antitrust laws. Illinois Brick Co. v. Illinois, 431 U.S. 720, 733-34 n.14 (1977).

effectiveness of private treble-damage actions as a means of enforcing the national antitrust policy will be seriously weakened, and a potent weapon will be removed from the antitrust enforcement arsenal. Moreover, a widespread, judicially-created exemption from antitrust damage actions will exist. All businesses which sell directly to nonbusiness consumers will be immune from damage actions brought by their customers. Therefore, contrary to public policy, these antitrust violators will be permitted to retain their ill-gotten gains while their victims, the purchasing consumers, will lack standing to recover damages.

The Eighth Circuit's decision draws a purely arbitrary distinction which is contrary to the plain meaning of the statute. Nonbusiness purchasers of a product cannot sue for damages caused by antitrust violations while business purchasers of the same product can sue for damages. The recovery of damages, therefore, will no longer depend on the establishment of an antitrust violation and proof of injury, but rather on the status of the injured party. Denying standing to nonbusiness consumers will have the effect of "met[ing] out the sanctions imposed by the antitrust laws unequally." *Lohse v. Dairy Commission*, 1977-2 Trade Cases ¶ 61,805, at 73,337 (D. Nev. 1977).

The ruling by the Eighth Circuit, if allowed to stand, will seriously threaten the effectiveness of the private antitrust action, "one of the surest weapons for effective enforcement of the antitrust laws." *Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 318 (1965). If the decision of the Eighth Circuit is not reversed, the admonition of this Court that "[c]ourt[s] should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in [the antitrust] laws,"

Radovich v. National Football League, 352 U.S. 445, 454 (1957), will be ignored. In addition, this Court's desire to keep "already protracted treble-damage proceedings" as simple as possible, *see, e.g., Illinois Brick Co. v. Illinois*, 431 U.S. 720, 732 (1977), will in many cases be frustrated by the elaborate inquiry which may be required to determine whether a product is purchased for a business or nonbusiness purpose.

II. THE DECISION OF THE EIGHTH CIRCUIT IS ERRONEOUS BECAUSE OF THE COURT'S MISINTERPRETATION OF PRIOR JUDICIAL DECISIONS CONSTRUING SECTION 4, AND ITS MISINTERPRETATION OF THE STATUTORY LANGUAGE AND LEGISLATIVE HISTORY OF SECTION 4.

A. Judicial Decisions

While this Court has never specifically ruled on the current issue,[2] the rationale of prior decisions of the Court strongly suggest that the Eighth Circuit's decision was in error. In *Chattanooga Foundry and Pipe Works v. City of Atlanta*, 203 U.S. 390 (1906), Justice Holmes indicated that one need not be injured in his business to recover treble damages because a diminution in property was sufficient. *See id.* at 396. The

[2] Seven United States district courts have specifically decided the current issue, five holding that section 4 grants nonbusiness consumers standing to sue. See notes 14-15 *infra* and accompanying text. The district courts holding that nonbusiness consumers do have standing were impressed by, and have relied upon, Judge Larson's well-reasoned district court decision in *Reiter*. *See, e.g., In re* Petroleum Prods. Antitrust Litigation, 1977-2 Trade Cases ¶ 61,639, at 72,630 (C.D. Cal. 1977) ("for the reasons so ably stated by Judge Larson"); *In re* Ampicillin Antitrust Litigation, 1977-1 Trade Cases ¶ 61,434, at 71,611 (D.D.C. 1977) ("the Court finds the recent opinion of Judge Larson . . . to be particularly persuasive authority").

Eighth Circuit attempts to circumvent this decision by noting that Atlanta "arguably sought recovery for a business injury."[3] However, the basis of this Court's decision was an injury to Atlanta's "property" and not its "business." This Court's recent decision in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), also demonstrated that nonbusiness consumers may recover damages under the federal antitrust laws.

The rationale this Court used last term in holding that section 4 grants standing to foreign plaintiffs strongly suggests that section 4 should be interpreted to grant standing to nonbusiness consumers. In *Pfizer Inc. v. Government of India*, 434 U.S. 308, 314-15 (1978), this Court stated that:

> [This] Court has noted that § 4 has two purposes: to deter violators and deprive them of " 'the fruits of their illegality,' " and "to compensate victims of antitrust violations for their injuries" (citations omitted). To deny a foreign plaintiff injured by an antitrust violation the right to sue would defeat these purposes. It would permit a price fixer or a monopolist to escape full liability for his illegal actions and would deny compensation to certain of his victims, merely because he happens to deal with foreign customers.

If the word "nonbusiness" is substituted for the word "foreign" in this quote, it becomes an excellent analysis of the policy problems which would occur if nonbusiness consumers were denied standing under section 4. To deny a nonbusiness consumer injured by an antitrust violation the right to sue would defeat the purposes of section 4 and would permit the violator to escape full liability for his illegal actions.

[3] Reiter v. Sonotone Corp., 1978-1 Trade Cases ¶ 62,098, at 74,818 (8th Cir. 1978).

The Eighth Circuit also relies heavily on this Court's opinion in *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972), to support its holding. The specific phrase emphasized by the court is that the words business or property "refer to commercial interests or enterprises." *Id.* at 264. However, as part of the same discussion in *Hawaii*, this Court stated that recovery was disallowed to prevent duplicative recoveries because "consumers . . . may recover themselves under § 4," *id.*, and that "Congress has given private citizens rights of action for injunctive relief and damages for antitrust violations . . . ." *Id.* at 266. Thus, when considered in the context of the full discussion, it is readily apparent that the phrase quoted by the Eighth Circuit was not intended to indicate that consumers suffering injury to their property do not have standing to sue under section 4. In fact, taken as a whole, the discussion in *Hawaii* supports the existence of consumer standing.

The Eighth Circuit decision is also in conflict with a long line of circuit and district court cases recognizing nonbusiness-consumer standing.[4] Indeed, from enactment of the Sherman Act in 1890 until 1977,[5] no federal court denied nonbusiness consumers the right to sue for damages under the federal antitrust laws.

[4] *See, e.g.*, Cleary v. Chalk, 488 F.2d 1315, n.17 (D.C. Cir. 1973), *cert. denied*, 416 U.S. 938 (1974); California v. Frito-Lay, Inc., 474 F.2d 774 (9th Cir.), *cert. denied*, 412 U.S. 908 (1973); West Virginia v. Chas. Pfizer & Co., 440 F.2d 1079 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971); Theophil v. Sheller-Globe Corp., 446 F. Supp. 131 (E.D.N.Y. 1978), *appeal docketed*, No. 78-7389 (2d Cir. July 27, (1978); Lohse v. Dairy Comm'n, 1977-2 Trade Cases ¶ 61,805 (D. Nev. 1977); *In re* Petroleum Prods. Antitrust Litigation, 1977-2 Trade Cases ¶ 61,639 (C.D. Cal. 1977); *In re* Ampicillin Antitrust Litigation, 1977-1 Trade Cases ¶ 61,434 (D.D.C. 1977); Lefrak v. Arabian Am. Oil Co., 405 F. Supp. 597 (E.D.N.Y. 1975); Cusick v. N.V. Netherlandsche Combinatie Voor Chem. Indus., 317 F. Supp. 1022 (E.D. Pa. 1970).

[5] *See* cases cited note 15 *infra* and accompanying text.

B. Statutory Language

Section 4 of the Clayton Act provides a damage remedy for "[a]ny person who shall be injured in his business or property" by a violation of the antitrust laws. The Eighth Circuit construes this language to require an injury of a "commercial nature" and, thus, to deny standing to consumers suffering nonbusiness injuries. *Reiter v. Sonotone Corp.*, 1978-1 Trade Cases ¶ 62,098 (8th Cir. 1978).

This construction is clearly at odds with the plain language of the statute. The statute grants standing to "[*a*]*ny* person who [is] injured in his business *or property*" (emphasis added). Nonbusiness consumers are clearly "persons" and the statutory language does *not* limit recovery to business injuries. Limiting recovery to business injuries changes the plain meaning of the statute. No longer will "[a] person whose property is diminished by a payment of money wrongfully induced [be] injured in his property" within the meaning of the federal antitrust laws. *See Chattanooga Foundry and Pipe Works v. City of Atlanta*, 203 U.S. 390, 396 (1906).

The statute is written in the disjunctive, allowing recovery for "business" *or* "property" damages. The use of the conjunction "or" expresses the clear intention of Congress to allow recovery for nonbusiness injuries to property.[6] Limiting recovery to business injuries violates a principal maxim of statutory construction—that Congress intends each word in a statute to have independent meaning and that, if it can be prevented, no clause or word should be considered superfluous. *See, e.g., Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307-08 (1961); *United States v. Menasche*, 348 U.S. 528, 538-39 (1955).

[6] *See, e.g.*, Waldron v. British Petroleum Co., 231 F. Supp. 72, 86 (S.D.N.Y. 1964) ("The word 'property' has wider scope and is more extensive than the word 'business.' Less is required to prove 'property' than to prove 'business.'").

C. Legislative History

The Eighth Circuit relies on the legislative history of section 7 of the Sherman Act, ch. 647, § 7, 26 Stat. 210 (1890), the predecessor of section 4 of the Clayton Act, 15 U.S.C. § 15 (1976), to support its restrictive interpretation of the phrase "business or property." The court relies heavily on the fact that the Senate Judiciary Committee, by replacing Senator Sherman's original language "any person or corporation injured or damnified" with "any person . . . injured in his business or property," meant to preclude suits for nonbusiness injuries.[7] The Eighth Circuit concludes, however, that the legislative history of the Sherman Act provides an "inconclusive explanation" for the change.[8] In fact, there is no indication whatsoever in the legislative history suggesting that the change was intended to restrict the class of persons entitled to sue for damages. Thus, the court is forced to rely on the existence of the change itself as proof of Congressional intent to deny recovery for nonbusiness injuries.[9] The court fails, however, to explain why the Senate Judiciary Committee did not use language specifically limiting recovery to business injuries if that was its intent.

The Eighth Circuit also bases its decision on the legislative history of the Clayton Act which adopted the "any person . . . injured in his business or property" language of section 7 of the Sherman Act as part of section 4 of the Clayton Act. The

[7] Reiter v. Sonotone Corp., 1978-1 Trade Cases ¶ 62,098, at 74,815-16 (8th Cir. 1978).
[8] *Id.* at 74,815.
[9] *See id.*

court relies on the legislative history of the Clayton Act to show that the primary purpose of the Act was to protect small businesses and attempts to infer from this that persons suffering nonbusiness injuries were not meant to have standing.[10] However, the court does not cite any legislative history indicating that the protection of small businesses was the sole intent of Congress. In addition, the court apparently fails to recognize that many antitrust violators sell to both business and nonbusiness purchasers and that giving standing to those who suffer nonbusiness injuries may, in many cases, contribute to the protection of small businesses. *Cf. Pfizer Inc. v. Government of India,* 434 U.S. 308, 314 (1978) (interpreting section 4 to grant standing to foreign governments).

Contrary to the Eighth Circuit's analysis, the legislative history of the Sherman and Clayton Acts indicates that Congress intended to give consumers standing to sue for injuries to their property, including nonbusiness injuries. As recently noted by this Court, the legislative history of the Sherman Act "indicate[s] that it was conceived primarily as a remedy for '[t]he people of the United States as individuals,' especially consumers," *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 486 n.10 (1977), and "Congress has given private citizens rights of action for . . . damages for antitrust violations." *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 266 (1972). As succinctly stated by Judge Nickerson, "it would seem anomalous to read the Clayton Act to exclude an action by the very persons sought to be protected." *Theophil v. Sheller-Globe Corp.*, 446 F. Supp. 131, 135 (E.D.N.Y. 1978), *appeal docketed,* No. 78-7389 (2d Cir. July 27, 1978).

[10] *See id.* at 74,816.

III. THE DECISION OF THE EIGHTH CIRCUIT MISINTERPRETS, AND WOULD EMASCULATE, THE *PARENS PATRIAE* PROVISIONS OF THE HART-SCOTT-RODINO ANTITRUST IMPROVEMENTS ACT OF 1976.

The decision of the Eighth Circuit is also apparently based, in part, on the belief that the *parens patriae* provisions of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 15c-h (1976), "will effectively protect the interests of consumers." *Reiter v. Sonotone Corp.*, 1978-1 Trade Cases ¶ 62,098, at 74,281 (8th Cir. 1978). However, because the *parens patriae* provisions of the Act are only procedural in nature, the effectiveness of the Act depends on the prior existence of consumer standing. *See Illinois Brick Co. v. Illinois,* 431 U.S. 720, 733-34 n.14 (1977).

The *parens patriae* provisions of the Act were passed to establish a more effective procedure for asserting the rights and remedies of natural persons[11] by granting State Attorneys General standing to bring actions on behalf of natural citizens suffering injury to their property. The *parens patriae* provisions were not intended to create any new substantive liability.[12] *See* H.R. Rep. No. 499, 94th Cong., 2d Sess. 9, *reprinted in* [1976] U.S. Code Cong. & Ad. News 2572, 2578. No

[11] The class of persons protected by the *parens patriae* provisions of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 are "natural persons," excluding "proprietorships or partnerships," 15 U.S.C. § 15g(3) (1976), in other words, nonbusiness consumers, the class denied standing by the Eighth Circuit.

[12] For an analysis of the legislative history of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 which concludes that no new substantive remedy was intended to be added by title III, see Scher, *Emerging Issues Under the Antitrust Improvements Act of 1976,* 77 Colum. L. Rev. 679, 722-25 (1977).

new substantive liability was thought to be necessary because, as Congress recognized, "any person, including any consumer, who can prove he was injured by price-fixing or any other antitrust violation, *has a cause of action*." H.R. Rep. No. 499, 94th Cong., 2d Sess. 6, *reprinted in* [1976] U.S. Code Cong. & Ad. News 2572, 2575 (emphasis added). Thus, contrary to the import of the Eighth Circuit's analysis, the 94th Congress intended to provide a more effective procedural remedy for natural citizens than *already existed* under section 4 of the Clayton Act.[13]

The anomaly of the Circuit Court's decision is obvious—nonbusiness consumers do not need standing to sue under section 4 because they are protected by the States' *parens patriae* authority; however, for the States to have *parens patriae* authority, standing for nonbusiness consumers must exist under section 4. Thus, the Eighth Circuit's decision would virtually nullify the *parens patriae* authority which Congress explicity granted to the States.

[13] Of course, the belief of the 94th Congress regarding the intent of the Congress that passed section 7 of the Sherman Act, ch. 647, § 7, 26 Stat. 210 (1890) (superseded by section 4 of the Clayton Act), is not controlling. However, the interpretation of a later Congress regarding what an earlier Congress meant is surely entitled to some weight, especially when, as here, it agrees with the majority of courts that have considered the question. See notes 14-15 *infra* and accompanying text.

IV. THE QUESTION OF NONBUSINESS-CONSUMER STANDING UNDER SECTION 4 HAS RESULTED IN A SPLIT OF AUTHORITY AMONG THE DISTRICT COURTS AND WILL LIKELY LEAD TO A SPLIT OF AUTHORITY AMONG THE CIRCUIT COURTS.

In the last two years, at least seven United States district courts have specifically decided the narrow issue presented by this case. Five of these courts,[14] located in four different circuits, interpreted section 4 of the Clayton Act to grant nonbusiness purchasers standing to sue while two[15] reached the opposite conclusion. The decisions of both courts denying standing and the decision of one of the courts granting standing have been appealed and are currently pending before three

[14] Theophil v. Sheller-Globe Corp., 446 F. Supp. 131 (E.D.N.Y. 1978), *appeal docketed*, No. 78-7389 (2d Cir. July 27, 1978); Lohse v. Dairy Comm'n, 1977-2 Trade Cases ¶ 61,805 (D. Nev. 1977); *In re* Petroleum Prods. Antitrust Litigation, 1977-2 Trade Cases ¶ 61,639 (C.D. Cal. 1977); *In re* Ampicillin Antitrust Litigation, 1977-1 Trade Cases ¶ 61,434 (D.D.C. 1977); Reiter v. Sonotone Corp., 435 F. Supp. 933 (D. Minn. 1977), *rev'd*, 1978-1 Trade Cases ¶ 62,098 (8th Cir. 1978).

[15] While four United States district court decisions have held that nonbusiness consumers do not have standing, three of them were decided on the same day by the same judge. All four of the decisions have been appealed. *See* Ware v. Trailer Mart, Inc., No. C74-394 (N.D. Ohio, decided May 31, 1978), *appeal docketed*, No. 78-3383 (6th Cir. July 20, 1978); Weinberg v. Federated Dep't Stores, Inc., 426 F. Supp. 880 (N.D. Cal. 1977), *appeal docketed*, No. 77-1547 and related cases (9th Cir. Mar. 3, 1977); Gutierrez v. E. & J. Gallo Winery Co., 425 F. Supp. 1221 (N.D. Cal. 1977), *appeal docketed*, No. 77-1896 (9th Cir. Apr. 22, 1977); Smith v. Toyota Motor Sales, U.S.A., Inc., 1977-1 Trade Cases ¶ 61,251 (N.D. Cal. 1977), *appeal docketed*, No. 77-1849 and related cases (9th Cir. Apr. 15, 1977).

different circuit courts: the Second Circuit, the Sixth Circuit, and the Ninth Circuit.[16]

While no other circuit court has explicitly ruled on the issue, and thus a direct split of authority between the circuits does not currently exist, a split is virtually certain to occur in the near future because the Eighth Circuit's decision is inconsistent with the decisions of other circuit and district courts[17] and the issue is already pending before three other circuits.

While granting the writ of certiorari will require that this Court spend its valuable judicial time considering the issue, it is respectfully submitted that this Court ultimately will be faced with this question, and that a definitive ruling at this time will conserve considerable judicial time in the lower courts. Moreover, a reversal of the Eighth Circuit decision by this Court will alleviate the disenfranchisement of nonbusiness consumers in the States of Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota, and will remove any chilling effect this precedent may have on the exercise of valid consumer rights in other circuits.

CONCLUSION

Because of the importance of this question, the fact that the Eighth Circuit erroneously decided the issue, the emasculation of the *parens patriae* provisions of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, and the inconsistency between the Eighth Circuit decision and decisions of other

[16] See notes 14-15 *supra*.
[17] *See* cases cited note 4 *supra* and accompanying text.

lower courts and this Court, the petititon for a writ of certiorari to the Eighth Circuit Court of Appeals should be granted.

Respectfully submitted,

WARREN SPANNAUS
Attorney General
RICHARD B. ALLYN
Solicitor General
ALAN H. MACLIN
Chief, Antitrust Division
STEPHEN P. KILGRIFF
Special Assistant
Attorney General
THOMAS W. KENYON
Special Assistant
Attorney General
720 American Center Building
St. Paul, Minnesota 55101

JOHN ASHCROFT
Attorney General
ROGER N. BERN
Chief Counsel,
Antitrust Division
WALTER O. THEISS
Assistant Attorney General
GREG HOFFMANN
Assistant Attorney General
Supreme Court Building
Jefferson City, Missouri
65101

Attorneys for Amici

(Additional List of Counsel on Inside Cover)